IN THE

Supreme Court of the United States.

OCTOBER TERM 1904.

No. 32.

THE BALTIMORE SHIPBUILDING AND DRY DOCK COMPANY OF BALTIMORE CITY,
Plaintiff in Error,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL, *Defendants in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

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STATEMENT.

This appeal involves the question of the right to assess, for purposes of State and municipal taxation, the interest of the Plaintiff in Error in a certain lot of ground and dry dock situated at Locust Point, within the city of Baltimore.

The land in question was formerly the property of the United States Government, being part of the Government Reservation known as Fort McHenry. The Plaintiff in Error acquired it by virtue of an Act of Congress, approved June 19, 1878, entitled "An Act granting a site for a dry dock in the city of Baltimore upon certain conditions," which Act provided as follows (Record, pages 17 and 18):

> "That the Secretary of War be and he is hereby directed to convey to the Baltimore Dry Dock Company of Baltimore city, a body corporate, created under the laws of the State of Maryland, for the consideration hereinafter described, so much of the land belonging to the United States in said city, known as the Fort McHenry tract, as lies between the northwestern boundary line of the said tract and a line parallel thereto, and distant four hundred and fifty feet therefrom, and between a line two hundred and fifty feet from the northern side of Fort avenue (a street or avenue of said city extended), and parallel thereto, and the northwest branch of the Patapsco river.
>
> "Sec 2. That in consideration of the said conveyance, and as the condition upon—the same is made, the said dry dock company shall be required to construct upon the land conveyed as aforesaid, within two years from the date of the conveyance, an efficient 'Simpson's Improved Dry Dock' four hundred and fifty feet in length, and to accord to the United States the right to the use forever of the said dry dock at any time for the prompt examination and repair of vessels belonging to the United States, free from charge for docking; and if at any time said property hereby conveyed shall be diverted to any other use than that herein named, or if the said dry dock shall be at any time unfit for use for a period of six months or more, the property hereby conveyed, with all its privileges and appurtenances, shall revert to and become the absolute property of the United States."

In accordance with this Act of Congress, a deed was duly executed on March 26, 1879, by the Secretary of War, conveying to the Plaintiff in Error the said property, upon the conditions set out in said Act. The Plaintiff in Error accepted the grant; constructed upon the land conveyed, within two years from the date of the conveyance, an efficient "Simpson's Improved Dry Dock" four hundred and fifty feet in length or over, and ever since that time has accorded to the United States the right to use said dry dock at any time for the prompt examination and repair of vessels belonging to the United States, free from charge for docking. Moreover, the said property has never been diverted to any other use than that of a dry dock, and the said dry dock has at no time been unfit for use for a period of six months or more.

The Appeal Tax Court of Baltimore City, on the 30th day of September, 1902, assessed the interest of the Plaintiff in Error in said land and dry dock, for the purpose of taxation, at seventy-five thousand dollars ($75,000), whereupon the Plaintiff in Error appealed to the Baltimore City Court. On this appeal, while the amount of the assessment was reduced from seventy-five thousand dollars ($75,000) to seventy thousand, six hundred and fifty dollars ($70,650), the Court held that the interest of the Plaintiff in Error in the said property was lawfully subject to taxation. Thereupon, the Plaintiff in Error again appealed to the Court of Appeals of Maryland. The decision of that Court being against it, it now asks this Honorable Court for relief.

By the Defendants in Error it will be contended:

1. That the interest of the Plaintiff in Error in the land and dry dock in question is not exempt from assessment, for purposes of State and municipal taxation, by reason of the fact that, under section 2 of the Act of Congress above set out, there is a possibility that said land and dry dock may revert to, and become the absolute property of, the United States.

2. That the interest of the Plaintiff in Error in the land and dry dock in question is not exempt from assessment, for pur-

poses of State and municipal taxation, by reason of the fact that, under section 2 of the said Act of Congress, the said dry dock, with its equipments, may be availed of by the United States Government for the prompt examination and repair of its vessels, free from charge for docking.

ARGUMENT.

I.

The interest of the Plaintiff in Error in the land and dry dock in question is not exempt from assessment, for purposes of State and municipal taxation, by reason of the fact that, under section 2 of the Act of Congress above set out, there is a possibility that said land and dry dock may revert to, and become the absolute property of, the United States.

We call the Court's attention to the three concluding paragraphs of the decision of the Court of Appeals of Maryland, set out on page 29 of the Record. These paragraphs are as follows:

> "Of course if it should ever become necessary for the State or city to sell this property of the appellant for the non-payment of taxes, nothing more could be sold than its conditional estate in the land and the permanent improvements thereon, subject to all of the rights of the United States therein."
>
> "It has been the custom and policy of this State, when it became necessary to sell for non-payment of taxes land in which several parties held different estates *all of which were subject to assessment and taxation*, to sell the fee simple estate in exercise of its sovereign power, Cooper vs. Holms, 71 Md. 720; Textor vs. Shipley, 86 Md. 424, but it is manifest that the sovereign power of the State does not embrace within its operation the right or estate of the Federal Government in the land now in question."
>
> "We hold that the conditional interest or estate of the appellant in this land, subject to the rights of the United States therein, constitutes property within the meaning of

section 2 of Article 81 of the Code, and is taxable by the State and the City of Baltimore. In view of the fact that the situation of the title to the land is such that the absolute fee therein cannot be taxed, and therefore could not be sold for non-payment of taxes, the assessment books should be so modified as to show that the estate assessed is subject to the right and interest of the United States in the land and improvements."

The Court of Appeals of Maryland has, therefore, held that it is simply the conditional interest or estate of the Plaintiff in Error in the land and dry dock, which is assessed and taxed by the State and city of Baltimore, and that, if it should ever become necessary for the State or city to sell the property of the Appellant in Error for the non-payment of taxes, nothing more could be sold than its conditional estate in the land and the permanent improvements thereon, subject to all of the rights of the United States therein.

It is the settled law of the State of Maryland that taxes are not levied on things, but on the owner of things; the value of the things owned merely fixing the measure of the owner's liability to contribute in taxes towards the support of the government.

Monticello Company vs. Baltimore City, 90 Md. 425.

Carstairs vs. Cochran, 95 Md. 500.

It is, therefore, manifest that the taxes have been levied, not on the land of the Plaintiff in Error, but on the Plaintiff in Error as the owner of the land; the value of the Plaintiff in Error's interest in the land being ascertained in order to furnish a basis upon which to compute the amount of taxes that should be paid.

Nor is there anything novel in the proposition that, in order to enforce the payment of taxes, a less interest than the absolute fee in the land can be sold. Article 50, section 50, of the Baltimore City Code provides as follows:

"When any lot or lots of ground, improved or unimproved, may be chargeable with the payment of taxes, and such lot or lots are subject to ground rent or lease for a term of years, renewable forever, it shall be the duty of the collector, in the sale of such lots for the non-payment of taxes, to sell the leasehold interest only, with the improvements erected thereon, if any; provided, however, that in case the said leasehold interest and improvements shall not sell for the amount necessary to pay the taxes due on said lots, together with the lawful costs, charges and interest as aforesaid, then the said collector shall sell the whole fee simple of such lots; and provided further, that the provisions of this section shall not apply in cases where the books of the city do not disclose the fact that the lot or lots are on lease as aforesaid, or unless the collector shall have actual notice of such lease prior to the sale thereof."

The provisions of that section have been acted on in Baltimore city for more than the last twenty-five years, and the validity of said provisions has been recognized by the Court of Appeals of Maryland.

Mayor and City Council vs. Whittington, 78 Md. 232.

Moreover, it is respectfully submitted that the decision of the Court of Appeals of Maryland in the case at bar is binding upon this Honorable Court.

In Carstairs vs. Cochran, 193 U. S., page 10, which was an appeal from the Court of Appeals of Maryland, this Court said:

"A State has the undoubted power to tax private property having a situs within its territorial limits, and may require the party in possession of the property to pay the taxes thereon. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

And, again, in Northern Pacific Railway Compay vs. Townsend, 190 U. S., page 270:

> "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

The property in question has a situs within the territorial limits of Baltimore city, and the plaintiff in error has been in full possession and enjoyment of said property for over twenty-five years, under a legal title, during that entire period, falling within the definition of a "base fee," or a fee simple title defeasible upon a condition subsequent. As such owner, its interest in said property has been assessed for taxes. No attempt has been made to assess or to tax the contingent interest of the United States Government.

The Act of Congress in question, and the deed executed by the Secretary of War in pursuance of said Act, made no attempt to exempt from taxation the interest acquired by the Plaintiff in Error, and, by the imposition of the tax, there manifestly has been no impairment of the efficiency of the grant, or the use and enjoyment of the property by the grantee.

Union Pacific R. R. vs. Peniston, 18 Wallace, 5.

Thus none of the limitations upon the State's power to tax, as set out in either Carstairs vs. Cochran, or Northern Pacific Railroad Company vs. Townsend *(supra)*, being present here, and the Court of Appeals of Maryland having determined the mode, form and extent of the tax upon the interest of the Plaintiff in Error to be lawful, there is no question left open for this Court to pass upon.

The Plaintiff in Error being in possession and full enjoyment of very valuable property, some cogent reason must be shown

by it why its said property should not bear its fair proportion of taxation for the benefit of the State and city governments. It seeks to find this reason in the decisions of this Court, in what are known as the "Land Grant" cases, to wit:

Kansas Pacific R. R. Co. vs. Prescott, 16 Wallace, 603.

Union Pacific R. R. Co. vs. McShane, 22 Wallace, 444.

Northern Pacific R. R. Co. vs. Traill County, 115 U. S. 600.

No attempt will be made to go fully into those cases. This Court has summed them up in 172 U. S., page 598, in the case of the Northern Pacific Railway vs. Myers, where the Court said, as follows:

> "In Railway Company vs. Prescott, 16 Wall. 603; Railway Company vs. McShane, 22 Wal. 444, and Northern Pacific Railroad Company vs. Traill County, 115 U. S. 600, it was decided that lands sold by the United States might be taxed before they had parted with the legal title by issuing a patent; but this principle, it was said, must be understood to be applicable only to cases where the right to the patent was complete and the equitable title was fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right. In the first case the Court said two acts remained to be done which might wholly defeat the right to the patent: (1) the payment of the cost of surveying; (2) a right of pre-emption which would accrue if the company did not dispose of the lands within a certain time. The dependency of the right of taxation on the first condition was affirmed with the principle announced in Railway Company vs. McShane. The dependency of the right of taxation on the second ground was expressly overruled."

Manifestly there is nothing said there in conflict with the contention now being made by the Defendants in Error. If it

is lawful for a State to levy a tax where the legal title remains in the United States, provided the equitable title has fully vested in the corporation, it is surely lawful for the State of Maryland and the city of Baltimore to levy a tax where both the legal and equitable titles are vested in the Plaintiff in Error. If the right of pre-emption, which would accrue if the railroad company did not dispose of the lands within a certain time, did not defeat the right to tax, certainly the possibility that the land and dry dock in question might revert to the United States should not defeat the right to tax.

Again, in Northern Pacific Railway vs. Myers (*supra*), page 598, the Court said, referring to the McShane case, the Prescott case and the Traill county case:

> "Embarrassment to the title of the United States by the sale of the lands for taxes seems to have been the concern and basis of those cases."

Here, under the express ruling of the Maryland Court of Appeals, no embarrassment to the title of the United States can possibly arise; hence, the reason for the decisions in the above-mentioned cases does not exist in this case. In addition, in the Myers case, it was conceded that the interest of the railroad company in the lands was subject to taxation, the point insisted upon being that the lands themselves could not be taxed. As already shown in the case at bar, it is only the interest of the Plaintiff in Error in the land and dry dock that has been assessed for purposes of taxation, which thus brings it within the *concessum* in the Myers case.

Finally, we call the Court's attention to the fact that in Central Pacific Railroad Company vs. Nevada, 162 U. S., 512, and in Northern Pacific Railway vs. Myers, 172 U. S., 589, it was held that the possessory claim of the railroad company to Government lands lying within a State was subject to taxation by the State notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and for that reason excluded from the operation of the grant from the

United States to the railroad company. If the uncertainty as to the character of the lands, whether mineral or not, does not defeat the right to tax, the possibility of reverter to the United States should not have that effect in this case, so long as the property is still being held, enjoyed and possessed by the Plaintiff in Error. As was said by this Court in Wisconsin Railroad Company vs. Price Company, 133 U. S., 496, "he who has the right to property and is not excluded from its enjoyment shall not be permitted to use the legal title of the Government to avoid his just share of State taxation."

II.

The interest of the Plaintiff in Error in the land and dry dock in question is not exempt from assessment, for purposes of State and municipal taxation, by reason of the fact that, under section 2 of the said Act of Congress, the said dry dock with its equipments, may be availed of by the United States Government for the prompt examination and repair of its vessels, free from charge for docking.

It is respectfully contended that the correctness of this proposition is no longer open to question. The Appellant in Error claims that the dock, with its equipments, is in effect an agency of the government, and as such not subject to taxation by the State. It is settled, however, by Thompson vs. Union Pacific Railroad Company, 9 Wallace, 579, and Union Pacific Railroad Company vs. Peniston, 18 Wallace, 5, that the principle of exemption from taxation of governmental agencies does not apply to the property of individuals or corporations which is not in the exclusive use, or under the exclusive control of the government, although the latter may have a fixed right to a preference in the use of such property when occasion may require.

In the former case it was held that the property of the railroad was liable to State taxation, although the road formed part of a system of roads constructed under the direction and authority of Congress, and although it was bound to perform certain duties for the Government, and ultimately to pay to it

a fixed percentage of its revenue, and, in addition, had mortgaged its property to the United States.

In the latter case it was again held that the property of the railroad company was liable to State taxation, although the road was to some extent an agent of the General Government, designed to be employed, and actually employed, in the legitimate service of the Government, both military and postal, the Court stating, on page 36, as follows:

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is not dependent upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect."

It is not claimed in this case that the effect of the tax is to deprive the Plaintiff in Error of the power to serve the Government, or to hinder it from the efficient exercise of its power.

As a complete answer to the contention of the Plaintiff in Error, we simply reproduce what this Court said in Thompson vs. Union Pacific Railway Company, 9 Wallace, pp. 590 to 592:

> "But we are not aware of any case in which real estate or other property of a corporation, not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, from its contribution in common with other property to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government:
>
> "We do not doubt the propriety or necessity under the Constitution of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine that no State has the right to tax the means employed by the Government

of the United States, for the execution of its powers. But we think there is a clear distinction between the means employed by the Government, and the property of the agents employed by the Government. Taxation of the agency is taxation of the means. Taxation of the property of the agent is not always or generally taxation of the means. No one questions that the power to tax all property, business and persons, within their respective limits is original in the States, and has never been surrendered. It cannot be so used indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude in general in reference to persons and such corporations employed in Government service, that *when Congress has not interposed to protect their property from such taxation, such taxation is not obnoxious to that objection.* We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the Government. Every corporation engaged in the transportation of mails or of Government property of any description, by land or water, or in supplying materials for the use of the Government or in performing any service of whatever kind, might claim the benefit of the exemption. * * *

We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants, and must, therefore, answer the question certified to us in the affirmative."

Upon the whole case, it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be affirmed.

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